confidence[21] was held to have been forfeited because these data had been shown to a third party. There is a dictum to the effect that if the confidential character of the communications had not been waived, they could not have been inspected. Thus data otherwise open to inspection would be kept secret if they were being prepared for the city attorney, by operation of the same rule of evidence that would justify the attorney in refusing to produce them at the trial. The right to inspect public documents may be considered analogous to the right of discovery of private documents before trial.[22] Since documents which are privileged at the trial are protected from discovery before trial,[23] the protection afforded official confidential communications should operate retroactively to protect them from inspection by either a third party or the adverse party.[24] It would seem that such a rule would be justified in that it gives the city the greatest degree of freedom in preparing its case.

H. R. M.

RESTRAINT OF TRADE: "OPEN COMPETITION PLAN" VIOLATES SHERMAN ANTI-TRUST ACT—*American Column and Lumber Company v. United States*[1] reaffirms the general attitude of the United States Supreme Court as to the meaning of "monopoly" under the Sherman Act,[2] but the case goes one step further and declares the so-called "Open Competition Plan" to be a violation of the statute.

Section one of the Sherman Act[3] is applicable to the principal case. It reads: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." Though it was earlier held in the Freight Association Case[4] that "in restraint of trade or commerce" includes any direct restraint, even though absolutely reasonable, yet the Standard Oil Case[5] later established the common-law "rule of

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[21] Cal. Code Civ. Proc., § 1881, subd. 5.

[22] Cal. Code Civ. Proc., §§ 1000, 1985, 1986.

[23] Arnold v. Chesebrough, 41 Fed. 74; Mott v. Consumers' Ice. Co. (1876) 52 How. Prac. 149; Lowenthal v. Leonard (1897) 46 N. Y. Supp. 818.

[24] Wigmore points out that at common law precisely the opposite result was reached where discovery was permitted because of the right of inspection of corporate or manorial records, even though there existed no general right of discovery. 3 Wigmore, § 1858, p. 2436.

[1] (Dec. 19, 1921) 42 Sup. Ct. Rep. 114, U. S. Adv. Ops. 1922, p. 159.

[2] Act of July 2, 1890, c. 647, 26 U. S. Stat. at L. 114, U. S. Comp. St. (1918) §§ 8820-8823, 8827-8830, Barnes' Fed. Code (1919) §§ 7944-7975, 9 Fed. St. Ann. (2d ed.) 644.

[3] Supra, n. 2.

[4] United States v. Trans-Missouri Freight Association (1897) 166 U. S. 290, 41 L. Ed. 1007, 17 Sup. Ct. Rep. 540. Reaffirmed in United States v. Joint-Traffic Association (1898) 171 U. S. 505, 43 L. Ed. 259, 19 Sup. Ct. Rep. 25.

[5] Standard Oil Co. v. United States (1911) 221 U. S. 1, 55 L. Ed. 619, 31 Sup. Ct. Rep. 502, 34 L. R. A. (N. S.) 834.

reason" as the true basis of interpretation. It is still held, however, that the restraint must be direct and not indirect.[6] But the main question arises as to the type of combination or monopoly which will be declared illegal under the Act. The Tobacco[7] and United States Steel[8] cases established that "monopoly" for the purposes of the Sherman Act has not the popular meaning of controlling all, but means control of all or any part so as to injure the public by unduly enhancing the price and keeping out competition. Mere bigness is not enough if the other elements are not present.[9] The foregoing appears to be well settled and is all quite clear so far as the principal case is concerned. The main question arises on the further point applying the "rule of reason" to the determination of "monopoly." This rule considers only the spirit and purpose without regard to the garb.[10] Here lies the difficulty in the principal case.

The so-called "New Competition" or "Open Competition Plan" which was held to violate the statute was practiced by an association of hardwood lumber manufacturers. The competitors exchanged information as to sales, prices and other details of their business through the medium of the organization. But this was no ordinary exchange of information. These concerns made daily, weekly and monthly reports of the minutest details of their business and through the association they jointly employed an expert business analyst. In return, the association made a "harmonized" estimate of the market and advised the "competitors" to increase or decrease production and quotations. Though no coercive methods were used, it appeared that the "competitors" substantially followed the recommendations of the association. Query: Did the spirit and purpose of this "Open Competition Plan" come within the inhibitions of the Sherman Act? The majority of the court held that there was a violation of the statute. Mr. Justice Clarke expressed the gist of the decision: "It is plain that the only element lacking in this scheme to make it a familiar type of

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[6] United States v. E. C. Knight Co. (1894) 156 U. S. 1, 39 L. Ed. 325, 15 Sup. Ct. Rep. 249. Distinguished in Swift & Co. v. United States (1905) 196 U. S. 397, 49 L. Ed. 525, 25 Sup. Ct. Rep. 276 (combination of meat dealers to monopolize commerce in fresh meat among the States violates Anti-Trust Act). But query, if reconcilable with Northern Securities Co. v. United States (1904) 193 U. S. 329, 48 L. Ed. 697, 24 Sup. Ct. Rep. 436 (combination by stockholders in two competing interstate railway companies to form stockholding company which should acquire controlling interest in both railway companies is in violation of Anti-Trust Act).

[7] United States v. American Tobacco Co. (1911) 221 U. S. 106, 55 L. Ed. 663, 31 Sup. Ct. Rep. 632.

[8] United States v. United States Steel Corporation (1919) 251 U. S. 417, 64 L. Ed. 343, 40 Sup. Ct. Rep. 293.

[9] Supra, n. 8.

[10] Supra, n. 7; United States v. Winslow (1912) 227 U. S. 202, 57 L. Ed. 481, 33 Sup. Ct. Rep. 253.

the competition suppressing organization is a definite agreement as to production and prices."[11] But there was a strong dissent by Justices Brandeis, Holmes and McKenna. The essence of the dissent was that there is "nothing in the Sherman Law which should limit freedom of discussion, even among traders."[12]

To some, the "Open Competition Plan" appears as but another piece of chicanery to avoid the prohibitions of the statute. The legislative and political view which aims to enforce the utmost freedom of competition is clearly in accord with the decision in the principal case. But co-operation is the tocsin of the new age. Almost every interest in the community has its local organization, and these local groups have combined into state, district, national and even international associations. The prime purpose of these organizations is to collect data and to co-operate for mutual benefit. Furthermore, government bureaus and boards of trade have been organized with the same general purpose. They furnish details of sales and current prices in daily transactions. So, in reference to the principal case, business men generally are apt to have little patience with legislation and a decision which so manifestly goes counter to the trend of our national commercial life.

C. C. H.

SALES: POTENTIAL POSSESSION: CONTRACT FOR THE SALE OF FUTURE CROPS—By the decision in *Pratt-Low Preserving Co. v. Evans,*[1] a question of considerable importance and interest, particularly in California, is presented. The defendant sold to plaintiff corporation and covenanted to cultivate and deliver, all the peaches to be grown on a particular piece of defendant's ground, from the years 1917-1928. The contract contained a clause to the effect that the covenants therein were to run with the land. In August, 1919, the defendant sold the land and thereafter refused to perform the obligations of the contract, pleading that the covenant ran with the land and that he was thereby released. The Appellate Court held that the covenant was not of such a nature as to run with the land and so bind the purchaser. It also held that, notwithstanding the assignment, the defendant was liable for the breach of the contract.

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[11] Supra, n. 1, p. 116.

[12] Supra, n. 1, p. 123. Mr. Justice Brandeis: "The evidence in this case, far from establishing an illegal restraint of trade, presents, in my opinion, an instance of commendable effort to make possible its intelligent conduct under competitive conditions." Mr. Justice Holmes: "But I should have supposed that the Sherman Act did not set itself against knowledge—did not aim at a transitory cheapness unprofitable to the community as a whole because not corresponding to the actual conditions of the country."

[1] (Dec. 21, 1921) 36 Cal. App. Dec. 1038 (rehearing denied Jan. 20, 1922), 202 Pac. 241.